

1 THE HONORABLE JOHN C. COUGHENOUR  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 CHRISTOPHER JOHNSON,

11 Plaintiff,

12 v.

13 LYNN KUNKLE, et al.,

14 Defendants.

CASE NO. C13-0623-JCC

ORDER DENYING MOTION TO  
PROCEED IN FORMA PAUPERIS

15 This matter comes before the Court on the Report and Recommendation of the Honorable  
16 Mary Alice Theiler, U.S. Magistrate Judge, to deny Plaintiff Christopher Johnson's motion to  
17 proceed *in forma pauperis* ("IFP") (Dkt. No. 7). Having thoroughly considered the motion, the  
18 Report, and Johnson's objections, the Court hereby ADOPTS the Report and Recommendation  
19 and DENIES Johnson's motion to proceed IFP for the reasons explained herein.

20 Judge Theiler recommends denying Johnson's motion based on the three strikes rule of  
21 28 U.S.C. § 1915(g), which bars a prisoner from proceeding IFP if "the prisoner has, on 3 or  
22 more prior occasions, while incarcerated or detained in any facility, brought an action or appeal  
23 in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or  
24 fails to state a claim upon which relief may be granted, unless the prisoner is under imminent  
25 danger of serious physical injury." The Report and Recommendation concludes that Johnson's  
26 complaint does not contain "a plausible allegation that [Johnson] faced 'imminent danger of

1 serious physical injury' at the time of filing." *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th  
2 Cir. 2007). (Dkt. No. 7 at 2.)

3 The Court determines *de novo* only "those portions of the report or specified proposed  
4 findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Johnson  
5 objects that the reasons given in the Report and Recommendation for denying IFP status are  
6 "based on the past," whereas "the 9th Circuit has stated, 'The imminent danger provisions use[]  
7 present tense, and concern[] the initial act of bringing the lawsuit.'" (Dkt. No. 8 at 3 (citing  
8 *Andrews*, 493 F.3d at 1055).) The Court does not understand Johnson's objection. The Ninth  
9 Circuit made clear in *Andrews* that "the availability of the [imminent danger] exception turns on  
10 the conditions a prisoner faced at the time the complaint was filed, not at some earlier or later  
11 time." *Andrews*, 493 F.3d at 1053. That is the standard Judge Theiler used.

12 Johnson's second objection is that the imminent danger exception "is guided on 'bringing  
13 of action not specific claims.'" (Dkt. No. 8 at 3.) The Court agrees with Johnson that "if [any of  
14 his] claim[s] [plausibly] alleged that he faced an 'imminent danger' at the time he filed the  
15 complaint, § 1915(g) [would] allow[] his *entire lawsuit* to proceed IFP." *Andrews*, 493 F.3d at  
16 1055 (emphasis added). But nothing in the Report and Recommendation indicates that Judge  
17 Theiler misunderstood or misapplied that rule.

18 Johnson also objects that he only needed to make a "plausible" allegation that he faced  
19 imminent danger of serious physical injury at the time of filing. (Dkt. No. 8 at 3.) Again, that is  
20 the standard Judge Theiler used. The Court agrees with Report and Recommendation that  
21 Johnson failed to meet this standard.

22 Johnson complains that "the Magistrate's Report at page 2 at 18 clearly states, 'Plaintiff,  
23 therefore, does allege an imminent threat of injury.' This is all Plaintiff is required to do to  
24 proceed pursuant to 28 U.S.C. § 1915(g)." (Dkt. No. 8 at 3.) But as Johnson conceded in his  
25 prior objection, he must *plausibly* allege that he faced an imminent danger of serious physical  
26 injury. For the reasons provided in the Report and Recommendation, he failed to do so.

1 Johnson has had three previous lawsuits dismissed on the grounds that they were  
2 frivolous or malicious or failed to state a claim upon which relief may be granted, and he has not  
3 plausibly alleged that he faced imminent danger of serious physical injury at the time he filed his  
4 instant complaint. The Court therefore ADOPTS the Report and Recommendation (Dkt. No. 7),  
5 DENIES Johnson's motion to proceed IFP (Dkt. No. 1) based on the three strikes rule of 28  
6 U.S.C. § 1915(g), and DIRECTS him to pay the full filing fee of \$350 within thirty (30) days of  
7 the date of this order. If Johnson does not pay the fee, the Court will dismiss this case. The Court  
8 DIRECTS the Clerk to file Johnson's complaint only on receipt of the filing fee, and to close the  
9 case if Johnson does not pay the fee within thirty days. The Court further DIRECTS the Clerk to  
10 send copies of this order to Johnson and to the Honorable Mary Alice Theiler.

11 DATED this 29th day of May 2013.

John C. Coykendall

John C. Coughenour  
UNITED STATES DISTRICT JUDGE